Protecting Employees and the Attorney-Client Privilege

ABA Urges Reversal of Federal Agency Waiver Policies

In recent years, a number of federal governmental agencies have adopted policies that are undermining key employee legal protections, the attorney-client privilege and the work product doctrine during government investigations of companies and other organizations. Although all of these policies raise concerns, the most problematic are the Department of Justice's cooperation guidelines—set forth in the 2003 "Thompson Memorandum" and 2006 "McNulty Memorandum"—and the Securities and Exchange Commission's similar guidelines—set forth in the 2001 "Seaboard Report". Both agencies' policies contain provisions that erode employees' constitutional and other legal rights by pressuring companies and other entities to not pay their employees' legal fees during investigations, to fire them for not waiving their rights, or to take other punitive actions against them long before any guilt has been established. These federal agency policies also contain other harmful provisions that pressure companies, unions and other entities to waive their privileges as a condition for receiving cooperation credit during investigations.

Despite repeated requests, the Justice Department and other federal agencies have refused to reverse or fundamentally change their harmful employee rights and privilege waiver policies. Although the Justice Department issued new cooperation guidelines on December 12, 2006, as part of the "McNulty Memorandum," the new policy falls far short of what is needed to prevent further erosion of these important legal rights. In addition, the SEC and other federal agencies also have declined to modify their similar harmful policies.

S. 3217, introduced by Sen. Arlen Specter (R-PA), and H.R. 3013, introduced by Rep. Bobby Scott (D-VA), would reverse the harmful provisions in the McNulty Memorandum, the Seaboard Report, and other similar federal agency policies. Although the House overwhelmingly approved H.R. 3013 on November 13, 2007, S. 3217 is still pending in the Senate Judiciary Committee.

The ABA urges Congress to promptly pass this critical legislation because:

- **S. 3217 and H.R. 3013 will protect employees from the unfair provisions of the McNulty Memorandum, the Seaboard Report, and other similar federal agency policies.** While the Justice Department's McNulty Memorandum bars federal prosecutors from requiring companies to not pay their employees' legal fees in some cases, footnote 3 of the new policy continues to undermine employees' Sixth Amendment right to counsel by carving out a broad exception that swallows the general rule. The McNulty Memorandum, the SEC's Seaboard Report, and other similar policies also continue to deny credit to companies that assist employees with their legal defenses or decline to fire them for exercising their Fifth Amendment right against self incrimination. By forcing companies to punish their employees long before any guilt has been shown, these policies weaken the constitutional presumption of innocence and undermine principles of sound corporate governance. S. 3217 and H.R. 3013 would protect employees by reversing these unfair federal agency policies.

- **The legislation is needed to protect the attorney-client privilege and the work product doctrine.** Instead of eliminating the improper practice of forcing companies, unions and other organizations to waive their privileges in return for cooperation credit, the McNulty Memorandum still allows prosecutors to require organizations to waive the privilege after receiving high level Department approval and grants companies credit if they "voluntarily" waive without being asked. Moreover, as demonstrated by former Delaware Chief Justice Norman Veasey's recent report to Congress, which is available at http://www.abanet.org/poladv/priorities/privilegewaiver/cjveaseyletter.pdf, prosecutors continue to routinely pressure companies to waive the privilege despite the new DOJ policy. Whether direct or indirect, government demands for waiver are unjustified, as prosecutors only need the relevant facts to enforce the law, not the opinions or mental observations of counsel.

- **The attorney-client privilege and work product doctrine are essential to promoting corporate compliance with the law and protecting shareholders.** Lawyers play a key role in helping companies and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the

company's officers, directors, and employees, and must be provided with all relevant information necessary to properly represent the entity. By pressuring companies to waive their attorney-client privilege and work product protections, the McNulty Memorandum, the Seaboard Report, and other similar policies discourage company personnel from consulting with the company's lawyers, thereby impeding the lawyers' ability to conduct thorough internal investigations and effectively counsel compliance with the law. This harms shareholders, employees and society as a whole.

- **The legislation does not protect unscrupulous corporate executives or counsel in any way.** S. 3217 and H.R. 3013 protect only *valid* assertions of the attorney-client privilege and work product doctrine. They do not expand these protections, which are very limited under existing law, and they do not prevent any law enforcement official from investigating or examining the facts. In addition, the bills do not alter any applicable exceptions to the privilege, such as the "crime-fraud" or "advice of counsel" exceptions. Therefore, the legislation will not enable corporate executives to shield evidence of their ongoing misconduct by divulging it to corporate counsel. Once the counsel learns of the misconduct, the counsel is obligated by SEC regulations (Part 205 Rules, implementing Section 307 of the Sarbanes-Oxley Act) and by their state bar's binding ethical rules (based on ABA Model Rule of Professional Conduct 1.13) to report the misconduct "up the corporate latter"—including, if necessary, to the company's board of directors—until it is properly remedied. When the board learns of the misconduct, it has a fiduciary duty under Delaware law—which governs most U.S. corporations—to protect the shareholders by promptly reporting or otherwise remedying the misconduct. Furthermore, if a counsel actively participates in the misconduct, the material will not be privileged at all under the "crime-fraud" exception and both the executive and the counsel will be subject to possible indictment and punishment. None of these existing laws and rules are affected by the legislation in any way.

- **S. 3217 and H.R. 3013 would strike the proper balance between effective law enforcement and the preservation of fundamental employee legal rights, the attorney-client privilege, and the work product doctrine.** The legislation would prevent the Justice Department and other federal agencies from pressuring companies or other organizations to take unfair punitive actions against their employees or waive their privileges as conditions for receiving cooperation credit during investigations. At the same time, the legislation specifically preserves the ability of prosecutors to obtain the important, non-privileged factual materials they need to punish wrongdoers and enforce the law.

- **The legislation enjoys strong bipartisan support.** H.R. 3013 is cosponsored by both the Democratic and Republican leadership of the House Judiciary Committee and was overwhelmingly approved by the House in November 2007. H.R. 3013 and S. 3217 also are strongly supported by a broad coalition of legal and business groups—ranging from the American Civil Liberties Union and the National Association of Criminal Defense Lawyers to the U.S. Chamber of Commerce and the Association of Corporate Counsel—as well as numerous bar associations and former senior Justice Department officials. Additional information on the legislation is available online at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

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